

TEAGUE P. PATERSON, SBN 226659  
BEESON, TAYER & BODINE, APC  
1404 Franklin Street, 5<sup>th</sup> Floor  
Oakland, CA 94612  
Telephone: (510) 625-9700  
Facsimile: (510) 625-8275  
Email: tpaterson@beesontayer.com

Attorneys for Plaintiff  
TRI-COUNTIES WELFARE TRUST FUND

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
AT SAN JOSE

TRI-COUNTIES WELFARE TRUST FUND,  
Plaintiff,

v.

KELVIN HILDEBRAND, INC.,  
HILDEBRAND & SONS TRUCKING, INC.,  
WEST COAST DRAYAGE, HILDEBRAND  
BROTHERS TRUCKING, MORYA  
GULARTE TRUCKING, d/b/a MG  
TRUCKING, and KELVIN HILDEBRAND,  
Defendant.

Case No. CV-07-5941 JW

**MOTION AND NOTICE OF MOTION TO  
STRIKE AND CORRECT THE DOCKET  
AND DIRECT THE CLERK TO ENTER  
DEFAULT; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF**

Hearing Date:	June 27, 2008
Hearing Time:	9:00 a.m.
Courtroom:	8, 4 <sup>th</sup> Floor
Judge:	Hon. James Ware
Complaint Filed:	Nov. 26, 2007
Trial Date:	None

**MOTION AND NOTICE OF MOTION TO STRIKE AND CORRECT THE DOCKET**

**TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

YOU ARE HEREBY NOTIFIED THAT on June 27, 2008 at 9:00 a.m. in Courtroom 8 of the Northern District of California Federal Courthouse, San Jose Division at 280 South 1st Street San Jose, California, Plaintiffs will move and hereby do move to strike the following docket items consisting of correspondence carbon-copied to the Court and designated by the clerk as Answers to the Complaint: Docket Nos. 4, 5, 6, 11 and 12; to correct the docket pursuant to Fed. Rule Civ. Procedure No. 60; and further seek an Order from the Court directing the Clerk of Court to enter defaults of the Defendants.

1 The grounds for the motion are more fully set forth in the Points and Authorities submitted  
2 herewith, and are based on Federal Rules of Civil Procedure Nos. 9, 12, 55(a) and 60.

3 Plaintiffs' motion is based on this Motion and Notice of Motion, the Memorandum of Points  
4 and Authorities, the Declaration of Teague P. Paterson in support thereof.

5 Dated: May 9, 2008

6 Respectfully Submitted,

7 BEESON, TAYER & BODINE, APC

8 By: /s/ Teague P. Paterson  
9 TEAGUE P. PATERSON  
10 Attorneys for TRI-COUNTIES WELFARE  
11 TRUST FUND

12 **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF**  
13 **PLAINTIFF'S MOTION TO STRIKE AND CORRECT THE DOCKET**

14 **I. INTRODUCTION**

15 On November 26, 2007, Plaintiffs the Trustees of the Tri-Counties Welfare Trust Fund  
16 ("Fund"), a multiemployer collectively-bargained health and welfare fund governed by the Employee  
17 Retirement Income Security Act of 1974 ("ERISA"), filed a complaint alleging defendants Kelvin  
18 Hildebrand, Inc., Hildebrand & Sons Trucking, Inc., West Coast Drayage, Hildebrand Brothers  
19 Trucking, Morya Gularte Trucking, D/B/A MG Trucking, and Kelvin Hildebrand owed the Fund  
20 delinquent contributions and other damages for employees working in employment requiring  
21 coverage by and contributions to the Fund, and asserting liability for such contributions against all  
22 defendants on the basis that they are alter egos of each other and/or constitute joint employers of the  
23 relevant employees.

24 As indicated by the Clerk's Docket Entries Nos. 3, 7, 8, 9, 10 and 11, the Summons and  
25 Complaint were timely filed and served on all Defendants. Subsequently, the Defendants each  
26 mailed a one-page letter to the undersigned counsel requesting that they be dismissed from this action  
27 (*see* Declaration of Teague P. Paterson dated May 9, 2008, filed herewith ("Paterson Declaration")).  
28 Each letter indicates a carbon copy was sent to the Court. No defendant has appeared in this action,  
none have responded to the Complaint and none have indicated an intent to defend or otherwise

1 respond to the allegations set forth in the Complaint. Nonetheless, the letters were docketed as  
 2 Answers to the Complaint and entered on the docket as items numbered 4, 5, 6, 12 & 13. For the  
 3 convenience of the Court, the letters are attached to the Paterson Declaration as Exhibits A through E

4 On April 10, 2008, Plaintiffs filed Notices and Requests for Entry of Default, a Declaration of  
 5 Teague Paterson in support thereof and Proposed Orders, seeking an entry of default by the clerk with  
 6 respect to each Defendant excepting Morya Gularte Trucking (*see* Paterson Decl. ¶ 8; Docket Entries  
 7 Nos. 15, 16 through 31). All default papers were served on the respective Defendants, as indicated in  
 8 the Proof of Services Attached thereto.

9 On April 16, 2008, the Clerk entered Docket Nos. 33-38, consisting of the Clerk's declination  
 10 to enter default for the respective defendants. Plaintiffs, through their counsel, contacted the Clerk's  
 11 office that day and was informed that the requests to enter default were declined because the letters  
 12 were designated as Answers to the Complaint (See Paterson Decl. ¶ 9). The Clerk's Office further  
 13 indicated that it could not enter default unless the docket was corrected by order of the Court or the  
 14 items designated as Answers to the Complaint were stricken.

15 Therefore Plaintiffs request, through this noticed motion and for the reasons stated below, that  
 16 Docket entries 4-6, 12 & 13 be stricken or the docket otherwise be corrected, and the Court direct the  
 17 Clerk to enter defaults for defendants Kelvin Hildebrand, Inc., Hildebrand & Sons Trucking, Inc.,  
 18 West Coast Drayage, Hildebrand Brothers Trucking and Kelvin Hildebrand.

## 19 II. ARGUMENT

20 Other than the letters written to Plaintiffs' counsel and copied to the Court, the docket in this  
 21 case contains no pleading, motion or other paper from the Defendants. Rule 8(b) of the Federal Rules  
 22 of Civil Procedure requires a responsive pleading to "state in short and plain terms its defenses to  
 23 each claim asserted against it and admit or deny the allegations asserted against it by an opposing  
 24 party." Additionally, Rule 10 specifies the formal requirements for all pleadings. The Defendants  
 25 have not complied with these rules of practice, and the letters neither purport to be answers nor  
 26 satisfy even the lax pleading standards applicable to *pro per* litigants. Federal Rule of Civil  
 27 Procedure 12(f) allows this Court to strike these "pleadings" *sua sponte* or by motion.

28 For the reasons stated below the Court should strike Docket entry nos. 4, 5, 6, 12 and 13 – or  
 otherwise suitably correct the docket -- and direct the Clerk to enter defaults of the Defendants.

1 **A. The Corporate Defendants Have Not Filed Responsive Pleadings Or Otherwise**  
 2 **Appeared In This Action**

3 Defendants Hildebrand & Sons Trucking, Inc. and Kelvin Hildebrand, Inc. are incorporated  
 4 corporations and can not appear on behalf of themselves. Rather they must appear through counsel.  
 5 As evidenced by its letter dated December 13, 2007, Hildebrand & Sons Inc. holds itself out as an  
 6 incorporated entity, (see Paterson Decl., Exh. A; Docket Entry No. 4), as does Kelvin Hildebrand Inc.  
 7 (see Letter Dated December 19, 2007 attached to Paterson Decl. as Exh. D; Docket Entry No. 12)

8 Docket Entries Nos. 4 and 5 are therefore insufficient as answers or even appearances,  
 9 because “[i]t has been the law for the better part of two centuries...that a corporation may appear in  
 10 the federal courts only through licensed counsel.” *Rowland v. California Men's Colony*, 506 U.S.  
 11 194, 201-02 (1993). Nor can these letters be considered Answers under the lenient standard  
 12 applicable to defendants appearing in *pro per*, and as a result, even if the letters stated a recognizable  
 13 defense, which they do not, they would not be sufficient to constitute an answer to the Complaint.

14 Federal Rule of Civil Procedure 60(a) provides the Court with plenary power to correct  
 15 clerical errors in the docket. Because Docket Entries 4 and 12 indicate on their face they are filed by  
 16 incorporated business entities, it was error for the Clerk to docket them as Answers to the Complaint.  
 17 Plaintiffs therefore request the Court to correct the docket by striking these entries entirely. Plaintiffs  
 18 also request the Court to direct the Clerk to enter the a default with respect to these incorporated  
 19 defendants.

20 The Complaint and summons were served and, according to Rule 12(a), the time for  
 21 Defendants to appear and defend in this action has long since passed; no Rule 6(b) motion to extend  
 22 time was filed by any Defendant. When requested by a plaintiff, Fed. Rule Civ. Procedure 55(a)  
 23 permits the entry of a default against any defendant that has not timely appeared in the action.

24 **B. The Letters Submitted by Defendants MG Trucking, West Coast Drayage and**  
 25 **Hildebrand Bros. Do Not Constitute Answers to the Complaint**

26 The remaining Defendants, West Coast Drayage, MG Trucking, and Hildebrand Brothers, like  
 27 their corporate counterparts, simply wrote letters to Plaintiffs’ counsel with carbon copy to the Court  
 28 protesting the Complaint.

Under Ninth Circuit law, letters that merely protest a lawsuit “[o]bviously, [do] not meet the  
 formal appearance requirements specified by Rules 10 and 11, Fed.R.Civ.P.” *Wilson v. Moore &*

1 *Associates, Inc.*, 564 F.2d 366, 367, n. 1 (9th Cir. 1977). The letters submitted by Defendants do not  
 2 evidence an intent to defend the claims nor do they evince an intent to make an appearance *pro per*.  
 3 As in *Wilson*, given the relative sophistication of these Defendants (as indicated by the letters) and  
 4 their demonstrated close connection to one another, the Court should not indulge these Defendants.

5 Federal Rule of Civil Procedure 12(f)(2) allows this Court to strike pleadings that are so  
 6 plainly improperly classified as answers. *See, e.g., Lowe v. Warden and Commissioner of Holman*  
 7 *Prison Unit*, 450 F.2d 9, 12 n 2 (5th Cir. 1971) ("The minute entry shows that this unsigned  
 8 memorandum was filed and docketed as the warden's 'Answer' on June 17, 1971. Even construed so  
 9 as to do substantial justice, we do not believe this document should be allowed to serve the office of a  
 10 responsive pleading... See Fed. R.Civ.P. 8, 10(a), 11, 12.")

11 Plaintiffs therefore request this Court to correct the docket under its inherent power, strike  
 12 these letters as answers and direct the Clerk to enter the Defendants' default. Of course pursuant to  
 13 Rule 12(a), the time for defendants to appear and defend in this action has long since passed.

14 **C. Kelvin Hildebrand Has Failed to File Any Responsive Documents On His Own Behalf**

15 Finally, it was error for the Clerk to decline to enter default of Defendant Kelvin Hildebrand  
 16 (individually) as he has not filed any papers or carbon copied the Court on any Correspondence on  
 17 his own behalf (as distinct from Kelvin Hildebrand, Inc.) As a result, he is in default and the Court  
 18 should direct the Clerk to enter default as previously requested by Plaintiffs.

19 **III. CONCLUSION**

20 Based on the foregoing the Court should strike or otherwise correct docket item numbers 4, 5,  
 21 6, 12 and 13, and Order the Clerk to enter the default of Defendants Kelvin Hildebrand, Inc.,  
 22 Hildebrand & Sons Trucking, Inc., West Coast Drayage, Hildebrand Brothers Trucking and Kelvin  
 23 Hildebrand.

24 Dated: May 9, 2008

Respectfully Submitted,

BEESON, TAYER & BODINE, APC

By: /s/ Teague P. Paterson

TEAGUE P. PATERSON

Attorneys for TRI-COUNTIES WELFARE  
 TRUST FUND

**PROOF OF SERVICE****U.S. DISTRICT COURT CASE NO. CV-07-5941 JW**

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 1404 Franklin Street, 5<sup>th</sup> Floor, Oakland, California 94612. On this day, I served the foregoing Document(s):

**MOTION AND NOTICE OF MOTION TO STRIKE AND CORRECT THE DOCKET  
AND DIRECT THE CLERK TO ENTER DEFAULT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT THEREOF**

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California:

Kelvin Hildebrand, President  
KELVIN HILDEBRAND, INC.  
6 Lewis Road  
Watsonville, CA 95076

Dorothea M. Hildebrand, President  
HILDEBRAND & SONS TRUCKING, INC.  
6 Lewis Road  
Watsonville, CA 95076

Kathleen Espinoza, Office Manager  
HILDEBRAND BROTHERS  
TRUCKING  
635 San Juan Pass Road  
Corralitos, CA 95076

KELVIN HILDEBRAND  
6 Lewis Road  
Watsonville, CA 95076

Diane Hildebrand, Owner  
WEST COAST DRAYAGE  
P.O. Box 400  
Watsonville, CA 95077

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

I declare that the foregoing is true and correct. Executed in Oakland, California, on this date, May 9, 2008.

/s/Tanya Gatt  
Tanya Gatt, Secretary to Teague Paterson